CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/01

FIRST NATIONAL BANK OF SA LIMITED
t/a WESBANK — Appellant

versus

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICES — First Respondent

THE MINISTER OF FINANCE — Second Respondent

and

FIRST NATIONAL BANK OF SA LIMITED
t/a WESBANK — Appellant

versus

THE MINISTER OF FINANCE — Respondent

Heard on : 28 August 2001

Decided on : 16 May 2002

JUDGMENT

ACKERMANN J:

Introduction

[1] This is a direct appeal, with leave of this Court, from the judgment and order of the Cape

of Good Hope High Court[1] (the High Court) dismissing a constitutional challenge by the appellant, First National Bank of SA Limited (trading as Wesbank) (FNB), to the provisions[2] of section 114 of the Customs and Excise Act 91 of 1964 (the Act) in two High Court cases, Nos 825/99 (the Lauray-Airpark case) and 9101/94 (the Republic Shoes case) respectively. Although this Court has come to a different conclusion, the judgment of the High Court has been of much assistance in a complex matter.

[2] FNB is a financial institution that sells and leases movables. Three motor vehicles of which it is the owner have been detained under the provisions of section 114 of the Act. The first respondent is the Commissioner of the South African Revenue Service (the Commissioner) who is charged under section 2(1) of the Act with its administration. The second respondent is the Minister of Finance (the Minister) under whose aegis the Act falls.

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1 Reported as *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service and Another* 2001 (7) BCLR 715 (C); 2001 (3) SA 310 (C). References in this judgment will be to the South African Law Reports.

2 Its provisions are quoted in para 11 below.

[3] The two cases were consolidated for hearing in the High Court. In the Republic Shoes case it was common cause that FNB's cause of action had arisen before 27 April 1994, the date on which the interim Constitution came into force. The High Court accordingly correctly held, on the strength of the judgment of this Court in *Rudolph and Another v Commissioner for Inland Revenue and Others*,[3] that FNB could not validly base a challenge on either the interim Constitution or the 1996 Constitution[4] and that the substantive dispute in this case fell away. The only issue on appeal in the Republic Shoes case is the costs order made in the High Court. Unless the contrary is indicated, all references in this judgment will be to the Lauray-Airpark case.

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3 1996 (7) BCLR 889 (CC); 1996 (4) SA 552 (CC).

4 The Constitution of the Republic of South Africa 1996.

[4] The Act provides for the "levying of customs and excise duties and a surcharge; for a fuel levy and for an air passenger tax; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto".[5] It is primarily a fiscal measure and has counterparts in countries throughout the world. Section 114 is concerned with the collection of debts (customs debts) due to the state by the debtor (customs debtor) under the Act. For the purposes of this case, and at the risk of oversimplification it is helpful to emphasize two features of the provisions of section 114 at this stage. The first is that, in order to collect the debt owed, they allow the Commissioner to sell goods without the need for a prior judgment or other authorisation by a court. The second is that, in order to satisfy the debt owed, the Commissioner may sell goods even where the goods do not belong to the customs debtor but to some third party.

[5] FNB contends, as it did in the High Court, that section 114 of the Act constitutes an unjustified infringement of its constitutional rights to have access to the courts in the settlement of disputes,[6] to the protection of its property[7] and to its freedom to choose a trade.[8] Save for the constitutional attack, the entitlement of the Commissioner in terms of section 114 of the Act to act as he has done in this case is not in dispute.

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5 Its long title.

6 Section 22 of the interim Constitution and section 34 of the (1996) Constitution, quoted in paragraph 116 below.

7 Section 28 of the interim Constitution and section 25 of the (1996) Constitution, quoted in paragraph 25 below.

8 Section 26 of the interim Constitution, quoted in n 104 below and section 22 of the (1996) Constitution.

[6] The format of this judgment is as follows:

The factual background: paras 7 to 10.

Section 114 of the Act: paras 11 to 18.

Goods subject to detention and sale under section 114: paras 19 to 23.

The property challenge.

Introduction: paras 24 to 40.

The property challenge issues: paras 41 to 46.

The meaning of Section 25:

Introduction: paras 47 to 50.

The meaning of "property" in section 25 as applied to the present case: paras 51 to 56.

The approach to deprivation in the context of section 25: paras 57 to 60.

The meaning of "arbitrary" in section 25:

Introduction: paras 61 to 70.

Comparative law on deprivation of property: paras 71 to 99.

The conclusion reached on the meaning of arbitrary in section 25: para 100.

"Arbitrary" deprivation as applied to section 114 of the Act: paras 101 to 109.

Justification: paras 110 to 113.

The appropriate relief: paras 114 to 115.

The section 34 access to court challenge: paras 116 to 118.

The other challenge: para 119.

Disposal of the appeals: paras 120 to 131.

The order: paras 132 to 133.

The factual background

[7] FNB, acting in the normal course of its business, leased a Volkswagen Jetta to Lauray Manufacturers CC ("Lauray") in November 1994 and a Volkswagen Golf to Airpark Cold Halaal Storage CC ("Airpark") in November 1995. In January 1996 FNB sold a Mercedes-Benz to Airpark under an instalment sale agreement with reservation of ownership until the last instalment was paid. Appellant thus remained the owner of all three vehicles.

[8] On 16 February 1996 the Commissioner detained, and thereby established a lien, over several vehicles on Lauray's premises in terms of section 114 of the Act. One of these vehicles was the Volkswagen Jetta. This was done in order to obtain security for approximately R3,26m[9] comprising predominantly of outstanding customs duty, penalties and payment in lieu of forfeiture arising out of an alleged fabric smuggling network. Lauray was placed in provisional liquidation on 17 November 1997. On 18 December 1997 the liquidator cancelled the lease. The Commissioner lodged a claim with the liquidator and received an amount of R198 074,96. Appellant did not lodge a claim for the arrears in lease payments since it would have been treated as a concurrent creditor in circumstances where there was no prospect of a dividend for concurrent creditors. The Commissioner has indicated, subject to the outcome of these legal proceedings, that he intends selling the vehicle in order to satisfy the outstanding customs debts

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[9] The High Court found (above n 1 at 314I) that Lauray owed R3,26m to the Commissioner by 10 June 1996, but this should probably read 10 January 1996.

of Lauray. Lauray was originally allowed to use the Jetta after detention, but it has been stored in a state warehouse since 27 March 1998.

[9] On 7 April 1997 the Commissioner detained and established a lien over the Volkswagen Golf and the Mercedes-Benz leased and sold respectively by FNB to Airpark. This was done in order to obtain security for customs debts and penalties of R640 571,32 owed by Airpark. Airpark had removed goods from a customs and excise cold storage warehouse without paying customs duty. The Commissioner has not sought to liquidate Airpark since there would be no benefit to creditors. The Commissioner has however stated his intention to sell the vehicles in an endeavour to recover at least part of Airpark's outstanding debt of R397 920,80. The two vehicles have been stored in the state warehouse since 26 March 1998.

[10] It should further be noted that FNB claims substantial sums to be outstanding with regard to the three vehicles, both in terms of payments which have fallen in arrears and in terms of total outstanding contract payments.

Section 114 of the Act

[11] The Constitutional attack in this case is focussed primarily on the power of the Commissioner to detain and sell various types of property under the provisions of section 114 of the Act, which in its relevant part reads as follows:

> "(1)(a)(i) The correct amount of duty for which any person is liable in respect of any goods imported into or exported from the Republic or any goods manufactured in the Republic shall from the date on which liability for such duty commences; and

(ii) any interest payable under this Act and any fine, penalty or forfeiture incurred under this Act shall, from the time when it should have been paid,

constitute a debt to the State by the person concerned, and any goods in a customs and excise warehouse or in the custody of the Commissioner[10] (including goods in a rebate store-room) and belonging to that person, and any goods afterwards imported or exported by the person by whom the debt is due, and any imported goods in the possession or under the control of such person or on any premises in the possession or under the control of such person, and any goods in respect of which an excise duty or fuel levy is prescribed (whether or not such duty or levy has been paid) and any materials for the manufacture of such goods in the possession or under the control of such person or on any premises in the possession or under the control of such person and any vehicles, machinery, plant or equipment in the possession or under the control of such person in which fuel in respect of which any duty or levy is prescribed (whether or not such duty or levy has been paid), is used, transported or stored, may be detained in accordance with the provisions of subsection (2) and shall be subject to a lien until such debt is paid.

. . . .

(b) The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in paragraph (a) or (aA) and may be enforced by sale or other proceedings if the debt is not paid within three months after the date on which it became due.

. . . ."

[12] It is useful to paraphrase the mechanism for which section 114 provides in order to relate

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10 The South African Revenue Service Act 34 of 1997 substituted the word "Commissioner" for "Office" wherever it occurred in subsection (1), and for convenience and clarity "Commissioner" will be used throughout the judgment.

it to the wider scheme of the Act. The Act is singularly detailed and even a cursory overview of its provisions would burden this judgment unnecessarily. The limited explanation that follows under this heading is intended solely to provide a setting for the constitutional enquiry and will focus on customs duty. Issues of contention regarding the interpretation of section 114 will be dealt with later in the judgment.

[13] Two types of debt to the state are constituted by the provisions of section 114(1)(a) and may be secured and enforced by a lien and sale of goods. First, the "correct amount of duty" for which a person is liable from the date of such liability in respect of imports, exports or manufacture in the Republic.[11] Secondly, any interest payable and fine, penalty and forfeiture incurred from the date on which liability for such duty commences.[12]

The correct amount of duty

11 Section 114(1)(a)(i).

12 Section 114(1)(a)(ii).

[14] The main duties in question consist of customs duty on imported goods, excise duty on goods manufactured locally, and fuel levy on imported or locally produced goods. Liability for imported goods commences from the time when goods are deemed to be imported into the Republic.[13] Duty is payable at the time of entry for home consumption of such goods.[14] An importer of goods has to complete the requisite forms, produce a bill of entry as prescribed, and pay the customs duty within the time prescribed for making due entry.[15] The customs duty payable is determined by application of, amongst others, sections 45, 47(1) and 58(1) of the Act as circumstances may require, as well as the provisions of Schedules 1 and 2. The value for duty purposes is determined by the provisions of Chapter IX of the Act.[16] A wide range of persons is

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13 Sections 10 and 44(1).

14 Section 47(1).

15 Sections 38(1) and 39(1).

16 Sections 65 to 74A.

liable for the payment of duties under the Act.[17] With reference to customs duty this would include the master or pilot of the ship or aircraft concerned;[18] the container or the depot operator;[19] and importers,[20] the wide definition[21] of which would include import clearing agents, for instance.

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17 In this respect reference may be made to the list compiled in 5-32 to 5-34 of HC Cronje *Customs and Excise Service* (Butterworths) (Issue 5).

18 Section 44(3)-(5).

19 Section 44(5A)-(6).

20 Section 44(6)(c).

21 Definition of "importer" in section 1.

[15] It is important to note that the Act is premised on a system of self-accounting and self-assessment.[22] There exists no viable method by which the Commissioner can keep track of all goods imported that might result in customs duty being payable under the Act, and whereby such duties may be collected automatically. The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion.[23]

[16] The correct amount of customs and excise duty can only be determined if goods are classified under the correct tariff heading, and the value, quantity or volume of the goods has been determined correctly. The Commissioner may make a written determination in order to set the applicable tariff heading or value in relation to specific goods.[24]

[17] Such determination will be subject to appeal to a high court, but any amount due in terms of the determination shall be deemed to be correct and shall remain payable so long as the determination is in force.[25] An appeal may be brought within one year of such determination.[26] The appeals procedure envisaged by the above sections is based on the widely accepted principle relating to the recovery of fiscal claims of "pay now, argue later".[27] The provisions of section

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22 See Cronje above n 17 at Int-24.

23 Id.

24 Sections 47(9), 65(4)-(6) and 69(3) read with part 2B of schedule 1, respectively.

25 See sections 47(9)(b) and (e), 65(4)(a) and (c), and 69(3).

26 Sections 47(9)(f) and 65(6)(b).

27 See, for example, *Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd* 1988 (2) SA 765 (A) at 774D-F; *Metcash Trading Limited v The Commissioner for the South African Revenue*

39(1)(b) that payment of duty is to be made on delivery of the bill of entry is qualified by the following proviso:

Service and Another 2001 (1) BCLR 1 (CC); 2001 (1) SA 1109 (CC) paras 35-36; *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida* 496 US 18 (1990); *Phillips v Commissioner of Internal Revenue* 283 US 589 (1930).

> "Provided that the Commissioner may, on such conditions, including conditions relating to security, as may be determined by him, allow the deferment of payment of duties due in respect of such relevant bills of entry and for such periods as he may specify."[28]

Interest, fines, penalties and forfeitures

[18] The second category of "debt" in respect of which the provisions of section 114 are available to the Commissioner comprises interest, fines, penalties and forfeitures that have become payable. Interest is provided for in section 105 and does not run on penalties or fines. The Act provides for fines upon conviction for specific offences.[29] Section 87(1) provides that goods dealt with contrary to the provisions of the Act or in respect of which an offence[30] was committed, shall be liable to forfeiture. Section 93 provides for the remission of penalties in the discretion of the Commissioner. This would include forfeiture. The Commissioner may demand payment of the value of the goods liable to forfeiture in lieu of forfeiture.[31] The reference in section 114(1)(a)(ii) to forfeiture would include payment in lieu of forfeiture. Section 105(c) provides as follows:

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28 For an example of its operation see *Commissioner for Customs and Excise v Standard General Insurance Co Ltd* 2001 (1) SA 978 (SCA).

29 See sections 78(2) and (3), 79, 80(1), 82, 83, 84(1), 85 and 86.

30 See sections 81, 83, 84, 85 and 86.

31 Section 88(2)(a)(i).

"[T]he Commissioner may on such conditions as he may consider necessary –

(i) remit any interest for which any person is liable by virtue of this section;

(ii) permit payment of any amount referred to in paragraph *(a)* by instalments of such amounts and at such times as he may determine".

Goods subject to detention and sale under section 114

[19] The goods subject to detention and sale under section 114(1)(a)(ii) fall into the following five categories:

(i) any goods in a customs and excise warehouse or in the custody of the Commissioner (including goods in a rebate store room) and belonging to the customs debtor;

(ii) any goods afterwards imported or exported by the customs debtor;

(iii) any imported goods in the possession or under the control of the customs debtor or on any premises in the possession or under the control of the customs debtor;

(iv) any goods in respect of which an excise duty or fuel levy is prescribed (whether or not such duty or levy has been paid) and any materials for the manufacture of such goods in the possession or under the control of the customs debtor or on any premises in the possession or under the control of the customs debtor;

(v) any vehicles, machinery, plant or equipment in the possession or under the control of the customs debtor in which fuel in respect of which any duty or levy is prescribed (whether or not such duty or levy has been paid), is used, transported or stored.

By virtue of section 114(3) such goods would include the container of such goods.

[20] Section 114(1)(a)(ii) authorises the detention of the goods, and stipulates that such goods shall be subject to a lien until the debt is paid. Section 114(1)(b) provides that the claims of the State shall have priority over the claims of all other persons upon anything subject to a lien, and may be enforced by sale of the goods referred to above or by other proceedings if the debt is not paid within three months after the date on which it became due.

[21] Section 114 clearly authorises the detention and sale of the goods of third parties, that is persons who do not owe the section 114 debt to the state.[32] Only the first category of goods requires the goods to belong to the debtor.

[22] In relation to the second category, there need be no physical or other nexus between the goods belonging to a third party and the customs debtor; the only requirement is that the goods must have been imported or exported "afterwards" (presumably after the customs debt with which section 114(1)(a)(ii) is dealing, arose) by the customs debtor. In relation to the fifth category the only nexus required by the section between the goods of third parties and the customs debtor to render such goods subject to detention and sale by the Commissioner, is "possession or control" by the customs debtor; and as far as the third and fourth categories are

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32 *Secretary for Customs and Excise v Millman NO* 1975 (3) SA 544 (A) at 550A-B; *Rand Bank Limited v Government of the Republic of South Africa* 1975 (3) SA 726 (A) at 731D-732E; *Minister of Finance and others v Ramos* 1998 (4) SA 1096 (C) at 1100F-G.

concerned "possession or control" by the customs debtor or the presence of such goods "on any premises in the possession or under the control" of the customs debtor.

[23] In the context of section 114 the concept "possession or control" is of wide signification. The Act seeks to spread the enforcement and recovery wings of the Commissioner as widely as possible. It is trite law that possession of a movable requires both physical control (*detentio*) and the necessary state of mind (*animus*).[33] When used in a statute the context will determine what state of mind is required for possession in terms of such statute.[34] At common law a distinction is drawn between civil possession and natural possession. Under the former the state of mind required by the controller is that of keeping the article for herself as if she were the owner; under the latter it is sufficient if control of the article is for her own purpose.[35] In the case of other statutes "possession" has been construed to mean physical control plus the intention to control, either for the possessor's own purpose, or on behalf of another; in the latter case little more than conscious physical detention, custody or control is required.[36] Where, as in the present case, the critical phrase conjoins "possession and control", this would cover not only an intention to control for the possessor's own purpose but also mere conscious physical detention, custody or control.[37] In the case of the third and fourth categories above, the net is cast even wider, for all

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33 *Wille's Principles of South African Law* 8 ed by Hutchison, Van Heerden, Visser and Van der Merwe, Juta: Kenwyn, 1991 at 262-4; *Groenewald v Van der Merwe* 1917 AD 233 at 238-9.

34 *S v Brick* 1973 (2) SA 571 (A) at 579H and *S v Adams* 1986 (4) SA 882 (A) at 891D-E.

35 *S v Adams* id at 890H-J.

36 Id at 891A.

37 *S v Brick* above n 34 at 579H.

that is required is the presence of the goods in question "on any premises in the possession or under the control" of the customs debtor. The customs debtor need only be in possession or control of the premises, not of the thing itself; in fact she could be unaware of the presence of the thing on the premises in question.

The property challenge

Introduction

[24] Although one of the vehicles owned by FNB that is in issue in this case, namely the Volkswagen Jetta, was detained by the Commissioner on 16 February 1996, at a time when the Interim Constitution was still in force, it does not follow that – in relation to the property right challenge – that Constitution is necessarily applicable. The High Court proceedings in relation to this vehicle were instituted on 27 January 1999, at a time when the 1996 Constitution was already in force. At this date, FNB's ownership in the vehicle had not yet been taken away from it (to use a clumsy but neutral expression), but was threatened. If the actual taking away would amount to an infringement of FNB's constitutional property rights, then a threat would be actionable under section 38 of the 1996 Constitution.[38] The threat was an ongoing one and still persisted as an ongoing cause of action after that Constitution came into force. Section 38[39] of the Constitution permits a person to invoke the Bill of Rights in relation to both a "threatened" as well as an actual infringement of a right. I accordingly propose to consider the constitutional

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38 Which in its relevant part provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief . . . "

39 Quoted in n 38 above.

property attack under section 25 of this Constitution in respect of all the vehicles involved in the case.

[25] Section 25[40] of the Constitution in relevant part provides:

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40 Section 28 of the Interim Constitution provided:

> "28. Property
> (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may

"25. Property.–

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) . . .

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

. . . ."

[26] It was contended on behalf of FNB, both in the High Court and in this Court, that the detention and sale by the Commissioner under the provisions of section 114 of the motor

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be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

vehicles owned by FNB, under circumstances where FNB was not a customs debtor, amounted to an expropriation of the motor vehicles in question for purposes of section 25 of the Constitution. Neither section 114, nor any other provision of the Act provided for the payment of compensation for such expropriation as mandated by section 25(2)(b) of the Constitution. Accordingly, it was submitted, the provisions of section 114 of the Act that authorised such expropriation were inconsistent with section 25(1) of the Constitution and invalid.

The High Court's judgment on the property attack

[27] With regard to the property attack, the High Court found that the detention mechanism of section 114 was similar to the common law lien and the landlord's hypothec, both of which "may operate to defeat the rights of the owner of goods falling under the lien"[41]. Mere detention without sale "does not deprive the owner of his ownership", and any limitation of the property clause would therefore only arise upon sale of the goods so detained.[42] Regarding the power to sell the goods of third parties, the judge referred to the wide definition of an importer as "the person liable for customs duty"[43]. Under this definition, the "master of a ship or pilot of an aircraft may be liable for duty".[44] The judge then reasoned that section 114 created "subsidiary categories of co-principal tax debtors".[45] Taxation could not amount to deprivation or

41 Above n 1 at 327C.

42 Id 327D-E.

43 Id 328B-C.

44 Id 328E.

45 Id 328F.

expropriation.[46] The following passage is instructive of his reasoning:[47]

> "To the extent that the goods of affected owners are in the possession or under the control of the customs debtor (the importer), such owners themselves become liable for customs duty. The tax is, to all intents and purposes, extended to them. If this seems inequitable, the answer is that there is no equity about a tax. It is not more inequitable that a credit grantor should suffer than that the master of a ship should in certain circumstances incur liability."

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46 Id 328G-H.

47 Id 328F-G.

[28] In relation to goods liable to detention under section 114(1)(a)(ii) the judge drew a distinction[48] between a "credit grantor", who finances the sale or long term lease of such goods to the customs debtor and into which category FNB is placed; and "affected owners". Affected owners are in turn divided into affected owners who, not being credit grantors, stand in some other contractual relationship with the customs debtor in relation to the goods in question, and affected owners who do not and who have not given possession of such goods to the customs debtor, but such goods "happen to be on premises in the custody or control of the customs debtor".[49]

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48 Id 316I-J and 329A-B.

49 Id 329A-B.

[29] The judge assumed that the ownership of a credit grantor who was concerned mainly with security for his claim would qualify for constitutional protection,[50] but ruled that under section 114 no expropriation takes place "as that word is commonly understood".[51] Significantly though, this finding is limited to the property of credit grantors.[52] After finding that the lien upon and the sale of a credit grantor's goods under the section does not amount to expropriation, the judge proceeds to consider whether the impact of section 114 in relation to the goods of affected owners could be justified in free and democratic countries.[53] In doing so the judge also, in certain passages in the judgment, deals with justification in relation to credit grantors.[54]

[30] With regard to justification the court found that no less invasive methods than section 114 had been made out as viable alternatives,[55] and that "some democratic countries permit the attachment either of goods belonging to credit grantors or of goods (such as tools or equipment) used in the customs debtor's enterprise".[56] Owners in a contractual relationship with the customs debtor would have a claim for the value of the goods seized, although owners without such a

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50 Id 329J.

51 Id 330A.

52 Id 330F-G.

53 Id 330 F-G.

54 Compare id 330C-D.

55 Id 332A-C.

56 Id 334D.

relationship might have only an enrichment claim.[57] The revenue derived from selling the goods of third parties was probably "next to nothing"[58], but the "coercive effect on a shipping agent of having its customers' goods attached as security for duty which it owes must be considerable".[59] The judge concluded that the "decision on where the burden of taxation should fall is a policy one".[60]

[31] Before considering the relevant constitutional property provisions it is convenient to deal with the High Court's analysis of the section 114 mechanism summarised in paragraph 30 above. In doing so it is first necessary to emphasise that even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate

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57 Id 330F-G.

58 Id 335B.

59 Id 335B-C.

60 Id 335C. See also *Millman NO* and the other cases cited in n 32 above.

governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards. Moreover section 39(2) of the Constitution provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[61]

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61 The corresponding provision of the Interim Constitution (IC) (Act 200 of 1993), section 35(3), provided:

> "In the interpretation of any law and the application and development of the common law or customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

In *Carmichele v Minister of Safety and Security and Another*, 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC) it was held, at para 33 fn 17, that –

> "[a]s emerges from the provisions of section 35(3) of the IC and section 39(2) of the Constitution, the development of the common law will not be different whether we 'have regard to' or 'promote' the 'spirit, purport and objects' of the respective Bills of Rights."

In the *Carmichele* case[62] this Court held that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary but that the courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the section 39(2) objectives. There is a like obligation on the courts, when interpreting any legislation – including fiscal legislation – to promote those objectives.

[32] The keystone of the High Court's analysis of section 114 is the conclusion that section 114 turns third parties (credit-grantors and affected owners) into co-principal debtors, who are liable, with the customs debtor, for payment of the customs duty debt in question. I am unaware of any authority, and none has been cited to us, for the proposition that a person having a lien over the property of a third party thereby acquires an independent cause of action against the third party owner. In fact authority is to the contrary. In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd*[63] the Supreme Court of Appeal confirmed that a lien did not exist *in vacuo* but *to secure or reinforce* ("ter versekering of versterking") an underlying claim; accordingly neither a direct nor an indirect enrichment claim could be entertained if there had been no unjustified enrichment of the owner; it constitutes no more than a defence against the owner's *rei vindicatio.* Eiselen and Pienaar *Unjustified Enrichment*[64] express the principle aptly

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62 Above n 61 at para 39.

63 1996 (4) SA 19 (A) at 26J-27A. See also *Bombay Properties (Pty) Ltd v Ferrox Construction* 1996 (2) SA 853 (W) at 856C and Joubert & Faris (ed) *Law of South Africa* (First Reissue) Vol 15: *Lien* by Susan Scott, para 50.

64 1999 (Butterworths) 78 para (e).

as follows:

> "The lien or retention right is an ancillary right which supports the main claim, but is also dependent on it. In all cases where a party relies on a retention right the onus is on that party to prove the existence of the main claim without which it cannot survive."

[33] A lien is a right conferred on the possessor of another's property, on which the possessor has expended money or labour, to retain possession of such property until properly compensated, either under contract or on the basis of unjustified enrichment.[65] The fact that at common law the *fiscus* enjoyed a legal hypothec over the property of its citizens in respect of taxes and dues owing by them to the State[66] takes the matter no further, for the hypothec was only on the goods of the tax debtor. This hypothec was abolished by section 86 of the Insolvency Act, 32 of 1916.[67] When the equivalent statutory lien was introduced for the first time in section 142(1) of the Customs Act, 35 of 1944 it related only to the goods of the customs debtor.

[34] It is against this background that the effect of the lien under section 114(1)(a)(ii) must be considered. In my view such lien, to the extent that it relates to the property of third parties who are not customs debtors, does no more than provide a further execution object for the recovery of the debt from the relevant customs debtor. There is nothing in the wording or purpose of this

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65 Id.

66 *Millman NO* above n 32 at 548H.

67 Id.

section providing for the statutory "lien" to suggest that a radical departure from the fundamental legal principles relating to liens, referred to above, is envisaged. Least of all that a new and highly unusual form of co-principal customs duty liability is being created.

[35] As far as section 114 creates a lien over the property of third parties and enables the Commissioner to sell such property in execution of a customs debtor's obligation under the section, such liens over the property of third parties cannot, in my view, be equated with that of the common law lien or the landlord's hypothec, as found by the High Court.

[36] Unlike the case of common law liens, section 114 does not establish any significant nexus between the creditor (the Commissioner) and the non-debtor third party over whose property a lien is created. The provisions of section 114(1)(a)(ii) are so expansive – as indicated earlier in this judgment – that they can embrace goods of third parties under factual circumstances where there is no other legal relationship, or indeed any other relationship at all, between the third party in question and the Commissioner, or the third party and the customs debtor. Under such circumstances there would be no analogy at all between the lien under the section and any common-law lien.

[37] Dealing with the perceived inequity resulting from the conclusion reached by the judge, in the passage quoted in para 27 above, to the effect that the tax liability of the customs debtor is extended to the third party, the judge remarked that –

> " . . . there is no equity about a tax. It is not more inequitable that a credit grantor should suffer than that the master of a ship should in certain circumstances incur liability."

The flaw in this reasoning is that section 114 does not make the third party a customs debtor; it makes the goods of that party liable to be seized in execution of someone else's customs debt. The third party does not become a co-debtor and has no liability to the Commissioner to pay any tax at all. If the property is realised and there is a balance due on the tax debt, that remains the responsibility of the customs debtor. The question here is not about equity in tax, but whether it is constitutionally permissible to seize a third party's property for another person's customs debt.

[38] The detention of the goods could continue indefinitely, until such time as sold by the Commissioner or in execution by a creditor with an unsatisfied judgment against the owner. In this latter event the Commissioner would, by virtue of the section 114 lien, enjoy preference on the proceeds of the sale. In any of these events the Commissioner has the power to deprive FNB permanently of all its rights and benefits as owner of the vehicles. In practice, however, it is most improbable that the Commissioner would not sell the detained goods and such detention therefore constitutes a continuing and real threat of sale. The crucial issue to be determined on this part of the case is accordingly whether, in the absence of a relevant nexus between the goods and the customs debtor, the sale by the Commissioner – under section 114 of the Act – of goods owned by someone who is not a customs debtor, amounts to an unjustifiable infringement of the owner's section 25 property rights.

[39] The issue must be so broadly framed, without making any distinction between the position of FNB as credit grantor and the position of any other affected owner. This is so

because section 114(1)(a)(ii) is itself couched in expansive general terms identifying the targeted goods solely on the basis of some or other form of possessory relationship between the customs debtor and such goods. In relation to the targeted goods, the section draws no distinction between any categories of non-customs debtor owners of such goods. The different possible categories of such owners are legion.

[40] It may have been possible for the legislature to have devised a narrower category of non-debtor owners, for purposes of the section, which may or may not have passed constitutional muster. It is unnecessary to decide this. The legislature has not chosen to do so. It is not this Court's function to attempt to select such categories from a maze of them, nor to speculate – for that is what it would amount to – about what the legislature might have done had it formulated the section with the idea of constitutional compatibility in mind. Under these circumstances it is impermissible for this Court to attempt to formulate a narrower set of categories of third parties falling within the purview of section 114(1)(a)(ii) and only to consider the section's constitutionality in respect of such categories; this would in effect be a legislative act.[68] Section 114 is certainly not the sort of provision that is reasonably capable of a narrower construction in conformity with the Constitution.[69]

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68 *Coetzee v Government of the Republic of South Africa and Others; Matiso v The Commanding Officer, Port Elizabeth Prison and Others*, 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC) paras 13 and 17; *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC); 1996 (3) SA 617 (CC) paras 93 and 97; and *Mistry v Interim National Medical and Dental Council and Others* 1998 (7) BCLR 880 (CC); 1998 (4) SA 1127 (CC) paras 21, 25 and 27.

69 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) para 85; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) paras 22-24.

The property challenge issues

[41] A preliminary question is whether FNB, as a juristic person, is entitled to the property rights protected by section 25 of the Constitution. In this regard section 8(4) of the Constitution provides as follows:

> "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[42] In the *First Certification* case[70] an objection was raised that, inconsistently with Constitutional Principle II, the extension of the rights guaranteed by the Bill of Rights to juristic persons would diminish the rights of natural persons. This Court rejected the objection in the following terms:

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70 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC).

> " . . . [M]any 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not."[71]

In the *Hyundai* case[72] this Court held that although juristic persons are not the bearers of dignity they are entitled to the right to privacy although their privacy rights "can never be as intense as those of human beings".[73] Exclusion of juristic persons from the right to privacy –

> " . . . would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy,

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71 Id para 57.

72 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079 (CC); 2001 (1) (SA) 545 (CC).

73 Id para 18.

although not to the same extent as natural persons."[74]

[74] Id.

[43] We are here dealing with a public company. It is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that its assets are its exclusive property.[75] Nevertheless, a shareholder in a company has a financial interest in the dividends paid by the company and in its success or failure because she " . . . is entitled to an aliquot share in the distribution of the surplus assets when the company is wound up".[76] No matter how complex the holding structure of a company or groups of companies may be, ultimately – in the vast majority of cases – the holders of shares are natural persons.

[44] More important, for present purposes, is the universal phenomenon that natural persons are increasingly forming companies and purchasing shares in companies for a wide variety of legitimate purposes, including earning a livelihood, making investments and for structuring a pension scheme. The use of companies has come to be regarded as indispensable for the conduct of business, whether large or small. It is in today's world difficult to conceive of meaningful business activity without the institution and utilisation of companies.

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75 *The Law of South Africa* Vol 4 Part 1 (First Reissue) paras 18, 21-23.

76 Id, para 23.

[45] Even more so than in relation to the right to privacy, denying companies entitlement to property rights would " . . . lead to grave disruptions and would undermine the very fabric of our democratic State".[77] It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons. I therefore conclude that FNB is entitled to the property rights under section 25 of the Constitution, its provisions having been quoted in paragraph 25 above. I accordingly proceed to consider the property challenge.

[46] The following questions arise:

(a) Does that which is taken away from FNB by the operation of section 114 amount to "property" for purpose of section 25?

(b) Has there been a deprivation of such property by the Commissioner?

(c) If there has, is such deprivation consistent with the provisions of section 25(1)?

(d) If not, is such deprivation justified under section 36 of the Constitution?

(e) If it is, does it amount to expropriation for purpose of section 25(2)?

(f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?

(g) If not, is the expropriation justified under section 36?

Before turning to these issues it is essential, by way of introduction, to consider the meaning of

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77 *Hyundai* above n 72 para 18.

section 25 more broadly and in a more comprehensive context.

The Meaning of section 25: Introduction

[47] Constitutional property clauses are notoriously difficult to interpret[78] and it is unlikely that the interpretation of section 25 of the Constitution will be wholly spared these problems. A court is therefore fortunate, at this relatively early stage of section 25 jurisprudence, to have at its disposal a considerable body of work produced by South African scholars in the field.[79] In this

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78 Even a cursory reading of the works cited in n 79 below illustrates this. See also Kleyn, below n 79, at 404.

79 Particular mention must be made of the seminal works of Carole Lewis "The Right to Private Property in a New Political Dispensation in South Africa" in (1992) 8 *SAJHR* 389 ("Lewis 1992") and AJ van der Walt, *The Constitutional Property Clause* Juta: Kenwyn, 1997 (Van der Walt 1997) and *Constitutional Property Clauses: A Comparative Analysis* Juta: Kenwyn, 1999 (Van der Walt 1999). Other significant contributions by South African scholars in this field include Budlender "The Constitutional Protection of Property Rights: Overview and commentary" in Geoff Budlender et al, *Juta's New Land Law,* Juta: Kenwyn, 1998 ("Budlender"); Matthew Chaskalson "The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth" (1993) 9 *SAJHR* 388 ("Chaskalson 1993); "The Property Clause: Section 28 of the Constitution" (1994) 10 *SAJHR* 131 ("Chaskalson 1994"); "Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 ("Chaskalson 1995"); Matthew Chaskalson and Carole Lewis

judgment heavy reliance is placed on such work and the assistance derived therefrom gratefully acknowledged.

[48] Section 25 embodies a negative protection of property and does not expressly

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"Property" in Chaskalson et al *Constitutional Law of South Africa* Juta: Kenwyn, 1998, chapter 31 ("Chaskalson and Lewis"); De Koker and Pretorius "Confiscation Orders in terms of the Proceeds of Crime Act: some constitutional perspectives" (1998) *TSAR* 39, 277, 467 ("De Koker and Pretorius"); Johan de Waal et al *The Bill of Rights Handbook* 4ed, Juta: Kenwyn, 2001, chapter 25 ("De Waal et al"); Kleyn "The constitutional protection of property: a comparison between the German and the South African approach" (1996) 11 *SAPL* 402 ("Kleyn"); Murphy "Property Rights and Judicial Restraint: A Reply to Chaskalson" (1994) 10 *SAJHR* 385 ("Murphy 1994"), "Interpreting the property clause in the Constitution Act of 1993" (1995) 10 *SAPL* 107 ("Murphy 1995"); Roux "Constitutional Property Rights Review in Southern Africa: the Record of the Zimbabwe Supreme Court" (1996) 8 *Afr J Int & Comp L* 755 ("Roux"); Van der Walt, AJ and Botha, H "Coming to grips with the new constitutional order: critical comments on *Harksen v Lane NO*" (1998) 13 *SAPL* 17 ("Van der Walt and Botha"); Erasmus "Reconciling land reform and the constitutional protection of property: A look at jurisdictions without an official land reform programme" (2000) 15 *SAPL* 105 ("Erasmus").

guarantee the right to acquire, hold and dispose of property. This was one of the major objections raised against the section and rejected by this Court in the *First Certification* case.[80] After referring to the wide variety of formulations of the right to property in the constitutions and bills of rights of recognised democracies, the Court on that occasion pointed out that no universally recognised formulation of the right to property exists and held that the "[p]rotection for the holding of property is implicit in [section] 25".[81] Subsection (4)(b) makes plain that for purposes of the section "property is not limited to land".

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80 Above n 70 paras 70-71.

81 Id para 72.

[49] The subsections which have specifically to be interpreted in the present case must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole. Subsections (4) to (9)[82] all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa. The details of these provisions are not directly relevant to the present case, but ought to be borne in mind whenever section 25 is being construed, because they emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.

[50] The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on "democratic values" and "fundamental human rights" but also on "social justice". Moreover the Bill of Rights places positive obligations on the state in

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82 "(4)__For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5)__The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6)__A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7)__A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8)__No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36_(1).

(9)__Parliament must enact the legislation referred to in subsection (6)."

regard to various social and economic rights.[83] Van der Walt (1997)[84] aptly explains the tensions that exists within section 25:

> "[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case."

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83 See, for example, sections 24 (in regard to the environment), 26 (housing), 27 (health care, food, water and social security) and 29 (education).

84 Above n 79 at 15-16.

The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.[85]

The meaning of property in section 25 as applied to the present case

[51] For purposes of the High Court judgment Conradie J did not find it necessary to decide whether what was taken from FNB under section 114 of the Act amounted to "property" for purposes of section 25 but assumed, without deciding, that it did. At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25. Such difficulties do not, however, arise in the present case. Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the

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85 Id at 16.

object of the right and must therefore, in principle, enjoy the protection of section 25.[86]

86 Whatever disagreement there may be as to the outer limits of the meaning of "property" the writers accept that ownership of fixed property and movable corporeals must be included. Most do so implicitly while some do so explicitly such as, for example, De Waal et al above n 79 at 412-414; Lewis (1992) above n 79 at 397-399; Van der Walt (1999) above n 79 at 349-353.

[52] When considering the purpose and content of the property clause it is necessary, as Van der Walt (1997)[87] puts it –

> " . . . to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices [and I would add 'and control'] of entrenched constitutional values."[88]

That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts.[89]

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87 Above n 79 at 11.

88 See also, for example, Budlender at 1-19 to 1-22 (Original Service 1998); Chaskalson and Lewis at 31-5 to 31-6 (Revision Service 2, 1998); Erasmus 135-6; Kleyn at 412-413, 417; Lewis 1992 at 430; Murphy (1994) at 389-392. See above n 79.

89 Limiting the purpose for and the way in which property may be used, has always been a feature of urban development law, where the practice of "zoning" land for specific purposes is a prime example. (The following passage from para 324 of "Townships and Town Planning" by J Meyer in *Law of South Africa* Vol 28 (establishment volume) is illustrative of the situation in the past: "The content of town planning is, first, to accord a use right to each legally identifiable piece of land in a proclaimed township, dividing it into use zones such as residential; special residential; business; commercial and industrial; or even for educational or municipal purposes; parks; etc.") Even in relation to agricultural land, legislative restrictions

were placed on the sub-division of property (Sections 2 to 4 of the Subdivision of Agricultural Land Act 70 of 1970) and on the extent of permissible grazing and other use of the land in order to prevent its deterioration by, for example, soil-erosion (see, for example, section 6 of the Conservation of Agricultural Resources Act 43 of 1983, which provides that "the Minister may prescribe control measures which shall be complied with by land users to whom they apply".)

[53] It was however contended on behalf of the respondents that FNB's ownership in the vehicles was "nothing more" than "a contractual device which reserves 'ownership' of the vehicles in question [to FNB]" which "together with a range of other clauses in the relevant contracts, are designed to protect the Bank" and that the Constitution did not seek to protect "the reservation of ownership rights in leased goods by financial institutions". We were pressed in argument with the following passage from the judgment of the European Court of Human Rights in the *Gasus* case:[90]

> "Whatever the nature of retention of title compared with 'true' or 'ordinary' property rights – a question on which the Court discerns no common ground among the Contracting States – it is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price."

The essence of the submission is that the constitutional concept of property is dependent on the use made of the property by the rights holder – since FNB does not use the vehicles for driving, it cannot claim constitutional protection under section 25.

[54] This submission cannot be sustained. The fact that an owner of a corporeal movable makes no, or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property. It may be relevant to deciding whether a deprivation thereof is arbitrary and, if it is, whether such deprivation is justified under section 36 of the Constitution.

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90 *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403 at para 68.

We are here dealing only with corporeal movables and it is unnecessary to go any wider.

[55] The argument moreover incorrectly conflates the legal right and the commercial interest that FNB has in the vehicles in question. At the time when FNB concluded the relevant contracts it was the owner of all the vehicles. The "*reservation* of ownership" is not what the inquiry should focus on. This is no more than the description of the effect of a contractual term in the agreement. The fact that the agreements contemplate a stage when FNB might cease to be owner cannot affect the characterisation of its right of ownership for as long as it remains owner. Instead, it is FNB's ownership of the vehicle, and nothing else, that entitles it to treat the vehicle as an execution object in the event of its debtor defaulting under the agreement in question, or affords it a special advantage in insolvency. This is the essence of why a lease of moveables is viable; there is no need for further security since the ownership of the asset leased provides adequate security.

[56] Neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership, having regard to the other terms of the agreement, can determine the characterisation of the right. It does not matter that the owner would rather have the purchase price than the vehicle, nor that the economic value of the right of ownership might be small when the contract term draws to an end. A speculator has no less a right of ownership in goods purchased exclusively for resale merely because she has no subjective interest in them but sees them only as objects that will produce money on resale. I accordingly conclude that the right of ownership that FNB has in the vehicles in question constitutes property for purposes of section 25.

The approach to deprivation in the context of section 25

[57] The term "deprive" or "deprivation" is, as Van der Walt (1997) points out,[91] somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact

> "the term 'deprivation' is distinguished very clearly from the narrower term 'expropriation' in constitutional jurisprudence worldwide."[92]

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide *genus* of interference, "deprivation" would encompass all species thereof and "expropriation" would apply only to a narrower species of interference. Chaskalson and Lewis, using a slightly different idiom and dealing with both the interim and 1996 Constitutions, put it equally correctly thus:

> "Expropriations are treated as a subset of deprivations. There are certain requirements

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91 Above n 79 at 101ff.

92 That this is so worldwide can be gleaned from the references and examples given by Van der Walt id at 112-4, 116-132 and Van der Walt (1999) above n 79, at 46-58; 77-81; 89-91; 105-114; 132-150; 176-183; 213-218; 235-241; 250-253; 259-262; 268-273; 293-304; 364-372;384-394; 410-440; 473-489.

for the validity of all deprivations."[93]

[58] Viewed from this perspective section 25(1) deals with all "property" and all deprivations (including expropriations). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional.

93 Above n 79 at para 31.6, p 31-14 (Revision Service 2, 1998).

[59] If, however, the deprivation passes scrutiny under section 25(1) (i.e. it does not infringe section 25(1) or, if it does, is a justified limitation) then the question arises as to whether it is an expropriation. If the deprivation amounts to an expropriation then it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b).[94] Various writers, when dealing with the interrelation between deprivations and expropriations under section 25 refer to pre-constitutional judgments on expropriation. This must always be done circumspectly, because such judgments are not necessarily reliable when it comes to interpreting the property clauses under the interim and 1996 Constitutions.

[60] The starting point for constitutional analysis, when considering any challenge under section 25 for the infringement of property rights, must be section 25(1).

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94 Or as Chaskalson and Lewis put it, id:

> "Expropriations, however, must satisfy two additional requirements: they must be performed pursuant to a public purpose (or, in the case of the final Constitution, in the public interest) and must be accompanied by the payment of just and equitable compensation."

The meaning of "arbitrary" in section 25

Introduction

[61] Dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense. The infringement issue in relation to section 25(1) is thus really limited to determining whether the deprivation of property enacted by section 114 is "arbitrary", within the meaning of that concept as employed in section 25(1)[95] of the Constitution, because section 114 clearly constitutes a law of general application.

[62] The word "arbitrary", depending on its statutory context, may only impose a low level of judicial scrutiny, requiring nothing more than the absence of bias or bad faith to satisfy such scrutiny. For example, it has been held to mean "capricious or proceeding merely from the will and not based on reason or principle".[96]

[63] But context is all-important; as Lord Steyn observed in *R v Secretary of State for the*

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95 Which, I repeat, reads:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

96 *Beckingham v Boksburg Liquor Licencing Board* 1931 TPD 280 at 282 and *Johannesburg Liquor Licencing Board v Kuhn* 1963 (4) SA 666 (A) at 671C.

Home Department, ex parte Daly:[97]

> "The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results . . . This does not mean that there has been a shift to merits review. On the contrary . . . the respective roles of judges and administrators are fundamentally distinct and will remain so . . . Laws LJ (at 847 (para 18)) rightly emphasised in *Mahmood's case [R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840] 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in a case involving convention rights. In the law context is everything." (Emphasis supplied.)

Context is crucial, both in the sense that the concept "arbitrary" appears in a constitution, and in the sense that it must be construed as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution. This is certainly all part of the context.

[64] Yet context goes further and would include the particular international jurisprudential context in which the Constitution came into existence and presently functions. Section 39(1) of the Constitution provides that a court, when interpreting the Bill of Rights, "must consider international law" and "may consider foreign law". At the same time one should never lose sight of the historical context in which the property clause came into existence. The background is one of conquest, as a consequence of which there was a taking of land in circumstances which, to

97 [2001] 3 All ER 433 (HL) 433 at para 28.

this day, are a source of pain and tension. As already mentioned, the purpose of section 25 is not merely to protect private property but also to advance the public interest in relation to property. Thus it is necessary not only to have regard to foreign law, but also to the peculiar circumstances of our own history and the provisions of our Constitution. In the present case all this would be relevant to determining what purpose the word "arbitrary" was intended to serve in a Constitution which has established a constitutional state and in a provision therein dealing with the protection of property against deprivation by the state. It must be construed in a manner that is appropriate to determining whether the section 25(1) protection of property against deprivation for which no compensation is payable has been infringed (limited).

[65] In its context "arbitrary", as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is "reasonableness" and "justifiability", whilst the standard set in section 25 is "arbitrariness". This distinction must be kept in mind when interpreting and applying the two sections.

[66] It is important in every case in which section 25(1) is in issue to have regard to the legislative context to which the prohibition against "arbitrary" deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends

would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.

[67] De Waal et al[98] are of the view that a deprivation "is arbitrary" for purposes of section 25(1) "if it follows unfair procedures, if it is irrational, or is for no good reason". The protection against unfair procedure has particular relevance to administrative action – which protection is provided for under section 33 of the Constitution – but it could also apply to legislation and be relevant to determining whether, in the light of any procedure prescribed, the deprivation is arbitrary. Although the learned authors conclude that –

> "the substantive element of s 25(1)'s non-arbitrariness requirement probably does not involve a proportionality enquiry",[99]

their conclusion that deprivation would be arbitrary if it took place "for no good reason" seems to import a stricter evaluative norm than mere rationality, although less strict than the proportionality evaluation under section 36.

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98 Above n 79 at 422.

99 Id.

[68] Chaskalson and Lewis,[100] as well as Budlender,[101] contest the view that "arbitrary" in section 25(1) of the 1996 Constitution imports anything more than non-rationality and rely in this regard on this Court's judgment in *Lawrence*.[102] After referring to the judgment, Chaskalson and Lewis state the following:

> "The court stated that legislative measures are arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve. In so doing the court equated a 'non-arbitrary' standard of review with the 'rationality review' standard of minimal scrutiny in United States equality law. It emphasized that the prohibition against arbitrariness did not involve a proportionality enquiry between means and ends, but only a rationality enquiry. The proportionality enquiry was excluded in order 'to maintain the proper balance between the roles of the legislature and the courts': in a democratic society it is not the function of courts to sit in judgment over the merits of socio-economic policies of the legislature."[103] (Footnotes omitted.)

In this passage the learned authors seek to extrapolate the dicta in *Lawrence* and raise them to a level of generality in a manner not warranted by the constitutional context in which *Lawrence* was decided.

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100 Above n 79 para 31.5(b)(ii)(bb) at 31-13,14.

101 Above n 79 1-34 to 1-36.

102 *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC).

103 Above n 79 para 31.5(b)(ii)(bb) at 31-13, 14.

[69] The *Lawrence* case was concerned with certain provisions of the Liquor Act 27 of 1989 that restricted trading in wine under a grocer's wine licence. The constitutionality of the provisions was challenged, amongst others, on the grounds that they infringed the right to free economic activity as guaranteed by section 26 of the interim Constitution.[104] The case was not concerned with the meaning of "arbitrary". That word did not appear in section 26, or in the Liquor Act. What was an issue in *Lawrence*'s case was the meaning to be given to a proviso to section 26 that excluded certain measures from the protection given by section 26 (1) to free economic activity if they were "justifiable in an open and democratic society based on freedom and equality". Chaskalson P held that, in the context of section 26, measures that were arbitrary would be inconsistent with "values which underlie an open and democratic society based on freedom and equality" and would not pass constitutional scrutiny. The judgment went on to hold that if a broad meaning were to be given to the right to engage freely in economic activity under section 26(1), an equally broad meaning would have to be given to the power of the State to pass measures restricting economic activity under section 26(2). In that context, it was held that the provisions of section 26(2) would be met by measures embodying a rational relationship between

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104 The section provided as follows:

> "26. **Economic activity**
>
> (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
>
> (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

means and ends. Absent such relationship, the measure would be arbitrary and would not pass constitutional scrutiny.[105] That decision provides no authority for the manner in which

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[105] The relevant passages appear in paras 33, 41 and 44-45 of the judgment, thus:

> "[33] . . . [T]he right to engage 'freely' in economic activity should not be construed as conferring such a right on unqualified persons; nor should it be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary. Arbitrariness is inconsistent with 'values which underlie an open and democratic society based on freedom and equality', and arbitrary restrictions would not pass constitutional scrutiny.
>
> . . . .
>
> [41] This does not mean that there need be no connection between the 'design' [the word 'designed' is used in section 26(2)] and the 'end' sought to be achieved. The requirement that the measures be justifiable in an open and democratic society based on freedom and equality means that there must be *a*

rational connection between means and ends. Otherwise the measure is *arbitrary and arbitrariness is incompatible with such a society.*

. . . .

[44] Section 26 should not be construed as empowering a court to set aside legislation expressing social or economic policy as infringing 'economic freedom' simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems. If s 26(1) is given the broad meaning for which the appellants contend, of

"arbitrary" should be construed in the context of the property provisions of section 25 of the Constitution.

> encompassing all forms of economic activity and all methods of pursuing a livelihood, then, if regard is had to the role of the courts in a democratic society, s 26(2) should also be given a broad meaning. To maintain the proper balance between the roles of the Legislature and the courts s 26(2) should be construed as requiring only that there be *a rational connection between the legislation and the legislative purpose sanctioned by the section* . . . .
>
> [45] The rational basis test fits the language of the section which, unlike s 33, sets as the criterion that the measures must be justifiable in an open and democratic society based on freedom and equality, but does not require in addition to this that the measure be reasonable. The proportionality analysis which is required to give effect to the criterion of 'reasonableness' in s 33 forms no part of a s 26 analysis." (Emphasis supplied.)

[70] The present case does not deal with the implementation of legislative policies, whether social or economic, nor does it deal with mere differentiation in the context of equality jurisprudence. We are here concerned with statutory provisions in customs and excise legislation that deprive an owner of property for someone else's customs debt. I accordingly find the approach of Chaskalson and Lewis unpersuasive in this regard and for the same reasons am unable to accept the views of Budlender,[106] also based heavily on the *Lawrence* judgment. At the same time, I also cannot support the suggestion of Van der Walt that deprivations may have to comply with both the requirements of section 25 and the general requirements of section 36.[107] If the deprivation is not arbitrary, the section 25(1) right is not limited and the question of justification under section 36 does not arise.

Comparative law on deprivation of property

[71] There is broad support in other jurisdictions for an approach based on some concept of proportionality when dealing with deprivation of property, although the context and analytical methodology are not the same as under our Constitution. It is useful to consider approaches followed in other democratic systems before attempting to conclude what "arbitrary" deprivation

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106 Above n 79 at 1-34 to 1-35.

107 Van der Walt (1999) above n 79 at 105 states:

> "A deprivation in terms of section 25(1) (and this includes expropriations) has to comply with the requirements of section 25(1) (and probably also with the more general requirements in section 36)."

means under section 25 of our Constitution.

The United States of America

[72] The Fifth and Fourteenth Amendments to the Constitution of the United States of America together form the oldest, most well-known constitutional guarantee of property rights:

> "Amendment V[108]
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, [. . .] nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> . . . .
>
> Amendment XIV, Section 1[109]
> [. . .] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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108 1791.

109 1868.

[73] The Fifth Amendment contains two parts. The first may be referred to as the "due process clause" which provides that nobody shall be deprived of property without due process of law. The second is the so-called "takings clause" which provides that private property shall not be taken for public use without just compensation.[110] For present purposes the takings clause needs to be considered. It should be noted that the Fifth Amendment refers to a *taking* and that this term has a different meaning to that of expropriation or of compulsory acquisition as it is generally understood. Van der Walt puts it thus:[111]

> "The crucial feature that sets US takings law apart from the position in most other jurisdictions is the distinction between a 'taking' and an expropriation. 'Taking' as referred to in the Fifth Amendment, is a wide term that includes the narrower, more widely known category of formal expropriations or compulsory acquisitions in terms of the power of eminent domain, but it also extends to a further category of state actions that have the form of police power regulations of property but in effect amount to takings because they 'go too far'."

As Holmes J expressed it in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 415: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." This conclusion followed from the reasoning that –

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110 The "takings clause" does not form part of the text of the Fourteenth Amendment which applies to the States, but the Supreme Court has read the takings clause into the due process clause by reasoning that a taking of property for public use without the payment of compensation would violate the notion of due process as required under the Fourteenth Amendment. *Chicago Burlington and Quincy Railroad v City of Chicago* 166 US 226 (1897).

111 Van der Walt (1999) above n 79 at 423.

> "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."[112]

[74] It has been customary to refer to the regulatory powers of government as the *police power* and to government's power of expropriation as the power of *eminent domain*. While these tags are useful analytical tools, the above passage from Van der Walt (1999) illustrates that the exercise of the police power may in exceptional circumstances constitute a 'taking'.

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112 Ibid at 413.

[75] Although the concept of proportionality is seldom used by name when American courts determine the takings issue, the courts do appear to employ some sort of proportionality analysis. This appears from the test laid down by the Supreme Court in *Dolan v City of Tigard*[113] to determine whether a city council's conditions for approving a building permit exacted such dedications of land as to amount to an impermissible uncompensated taking notwithstanding the clear relationship between such conditions and the council's legitimate government purpose. Rehnquist CJ, who delivered the opinion of the Court, laid down a "rough proportionality" test to decide individual cases:[114]

> "We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

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113 114 S Ct 2309 (1994).

114 Id 2319-2320.

Australia

[76] Section 51(xxxi) of the Australian Constitution is the oldest constitutional property guarantee in a written Commonwealth constitution.[115] It empowers the federal government to expropriate property but requires compensation upon such acquisition. It is concerned with the legislative powers of the federal government ("the Commonwealth"). As such, it is not part of a traditional Bill of Rights, but serves that purpose by constraining the power of the federal government – it has no authority to enact legislation acquiring property without just terms. There is no provision in the Australian Constitution dealing explicitly with the regulation of property. Section 51(xxxi) provides as follows:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> [. . .]
>
> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws."

115 Allen, T "Commonwealth Constitutions and the Right not to be Deprived of Property" (1993) 42 *Int & Comp LQ* 523 at 525.

[77] The Australian High Court has taken a strict view against the circumvention of section 51(xxxi) by doing indirectly what the state has been prohibited from doing directly.[116] Emphasis is placed on substance and not on form. The courts have, however, developed a doctrine around the regulation of property (including the dispossession of property) where the regulation in question, although not falling within the ambit of section 51(xxxi), is nevertheless considered lawful despite the fact that no "just terms" are provided for.

116 See *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349-350.

[78] As foreshadowed above, not every compulsory acquisition of property by the Federal Government falls under section 51(xxxi). The courts require not only (i) an acquisition, but also an acquisition (ii) *for the purposes of section 51(xxxi)*. In this regard the dispossession of property will only qualify as an acquisition if some resulting benefit or advantage to the state can be identified.[117] As to the second test, a law that adjusts or resolves competing claims or that provides for the creation, modification, extinction or transfer of rights and liabilities as an incident of or a means of enforcing some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest, is not a law as meant in section 51(xxxi) of the Constitution.[118] Any acquisition in terms of such a law is seen as an "incidental benefit" and not one for the purposes of section 51(xxxi). It is thus a question of characterising the legislation.

[79] *Re Director of Public Prosecutions; Ex Parte Lawler and Another*[119] dealt with the forfeiture without compensation of a leased fishing vessel which had been caught fishing unlawfully. The owners were unaware that their vessel was being used in this manner. They attacked the statutory provision allowing for forfeiture as contravening section 51(xxxi). The Australian High Court held that the forfeiture in question did not constitute an acquisition of property within section 51(xxxi) but part of valid regulatory provisions.

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117 Compare discussion in Van der Walt (1999) above n 79 at 54.

118 *Mutual Pools & Staff Pty Ltd v The Commonwealth of Australia* (1994) 179 CLR 155 at 170-172.

119 (1994) 179 CLR 270.

[80] *Airservices Australia v Canadian Airlines International Ltd*[120] dealt with a statutory lien and the sale of aircraft in pursuance thereof. Airservices provided air traffic control and related services as the government air authority. It had the right to charge a fee "reasonably related to the expenses it incurred" but not such as to "amount to taxation". This fee was substantial. The fees were payable by air operators. Such operators did not necessarily own the aircraft they fly. Nevertheless, if the charges were outstanding for nine months, Airservices could impose a statutory lien over any aircraft operated by the debtor and sell it to recover the charges.

[81] In litigation concerning such a statutory lien the constitutionality of the provisions were attacked under section 51(xxxi) by the owner of the aircraft in question who was not a debtor. The majority of the High Court of Australia rejected this particular attack and held that the statutory liens and their consequences did not constitute an acquisition of property within section 51(xxxi) but part of valid regulatory provisions.

120 (1999) 167 ALR 392.

[82] In relation to deprivations not falling within the provisions of section 51(xxxi), the Australian High Court has developed a principle of proportionality in order to determine the circumstances under which it would be permissible for a statute to dispossess a person of property without compensation. Although frequently not mentioned by name, the approach has in substance been a form of proportionality inquiry. The following passage from the judgment of McHugh J in *Lawler*[121] is illustrative of the reasoning of the Court:

> "[A forfeiture] order . . . is a drastic but incidental measure whose purpose is to facilitate compliance with those provisions of the Act which regulate commercial fishing in Australian waters. When the forfeiture of property is a reasonably proportional consequence of a breach of a law passed under a power conferred by s. 51 of the Constitution, no acquisition of property for the purpose of s. 51(xxxi) takes place. The notion of paying fair compensation to the owner of property which is validly forfeited to the Crown for a breach of the law is simply absurd. . . . [T]he question is whether the forfeiture is reasonably incidental to the exercise of a power other than s. 51(xxxi). If it is not, the forfeiture is invalid. If it is, s. 51(xxxi) has no operation."

McHugh J moreover pertinently held that –

121 Above n 119 at 292-293.

> "[f]orfeiture of foreign vessels involved in illegal fishing in Australian waters is a reasonably proportional means of achieving . . . [the section 100] object [of protecting Australian fishing grounds from exploitation by foreign fishing vessels without the consent of the executive government]. Of course, in determining whether a law is a reasonably proportional means of achieving a legislative purpose, the Court must take into account the adverse impact of the law on those affected by the law."[122]

[83] In *Airservices Australia*[123] the following passage from the judgment of Brennan J in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[124] was confirmed:[125]

> "In my view, a law may contain a valid provision for the acquisition of property without just terms where such an acquisition is a necessary or characteristic feature of the means which the law selects to achieve its objectives and the means selected are appropriate and

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122 Id at 294.

123 Above n 120.

124 Above n 118 at 177-178.

125 *Airservices* above n 120 at para 98 per Gleeson CJ and Kirby J. See also paras 166, 501-503, 517-519.

> adapted to achieving an objective within power, not being solely or chiefly the acquisition of property. But where the sole or dominant character of a provision is that of a law for the acquisition of property, it must be supported by s 51(xxxi) and its validity is then dependent on the provision of just terms."

It was pointed out[126] that this was in effect the explanation of decisions that laws providing for the imposition of a tax, the compulsory payment of provisional tax, the seizure of the property of enemy aliens, the sequestration of bankrupts' property, the forfeiture of prohibited imports or the exaction of fines and penalties are not affected by section 51(xxxi).

Council of Europe

[84] Article 1 of the First Protocol to the European Human Rights Convention contains a property guarantee in the following terms:

> "[1] Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
> [2] No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> [3] The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." (Numbering of sentences supplied.)

126 Id at para 98.

[85] These three sentences have come to be referred to as the first, second and third "rules" respectively.[127] The first rule has come to be regarded as an institutional property guarantee. The second rule, despite the use of the word "deprived" has come to be identified with the state's power to expropriate and the third rule with the state's police power to regulate, or as a deprivation clause. Under the third rule dispossessions without compensation have been held to be lawful in cases where heavy property taxes have been imposed;[128] exchange control impositions have been levied;[129] compulsory contributions to a state pension scheme levied;[130] fines imposed for a criminal offence, and smuggled goods forfeited;[131] and property involved in a criminal act forfeited.[132]

[86] Under the Convention a proportionality analysis has been developed in order to determine whether a deprivation of property is lawful or not. The regulatory measure must comply with a municipal law (be lawful), be in the public interest and establish a fair balance

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127 *Sporrong & Lönnroth v Sweden* [1982] 5 EHRR 35 at para 61; *James v United Kingdom* [1986] 8 EHRR 123 at para 37.

128 *Gudmunder Gudmundson v Iceland* (1960) YB 3 394.

129 *X & Y v United Kingdom* (1973) 44 CD 29.

130 *X v The Netherlands* (1971) YB 14 224.

131 *X v Austria* (1979) 13 DR 27.

132 The *"AGOSI* case" (*Allgemeine Gold- und Silberscheideanstalt AG v The United Kingdom* (1987) ECHR Series A vol 108).

between the public interest served and the property interest affected.[133] As to what is necessary in the public interest, that is left to the State as they are seen to be the best judges on this, but still there must be a purpose. The states are given a wide margin of appreciation in this regard.[134]

Germany

[87] The German Basic Law property clause, Art 14 GG, reads as follows:

> "(1) Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.
> (2) Property entails obligations. Its use should also serve the public interest.

133 *X v Austria* [1979] 13 DR 27 and *Fredin v Sweden* [1991] ECHR Series A vol 192.

134 *X v Austria* [1979] 13 DR 27; *Fredin v Sweden* [1991] ECHR Series A vol 192; *X v Federal Republic of Germany* [1959] YB 3 244.

(3) Expropriation shall only be permissible in the public interest. It may only be ordered by or pursuant to the law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts."[135]

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135 "(1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.
(2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.
(3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streifalle der Rechtsweg vor den ordentlichen Gerichten offen." See also Van der Walt (1999), above n 79 at 121 for a discussion of an appropriate translation.

[88] The Courts distinguish between "provisions defining the contents and limits" ("Inhalts- und Schrankenbestimmungen") of property and dispossessions, which would classify as (legislative or administrative) expropriations in terms of Art. 14(3) GG.[136]

136 This distinction was drawn in 1981 by the Federal Constitutional Court in the important "Nassauskiesung" decision (BVerfGE 58, 300). Van der Walt (1999) above n 79 deals with the case at 142. See also Donald Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 1997 Duke University Press Durham at 257, who refers to the judgment as the "Groundwater Case" (with translated extracts) and Sabine Michalowski and Lorna Woods *German Constitutional Law* 1999 Ashgate Aldershot at 326 where it is called the "Gravel Decision".

[89] The distinction between a provision defining the contents and limits and expropriation has nothing to do with the extent of its interference with the property right of the individual; it is based exclusively on criteria that focus on the aim or purpose of the dispossession or interference. To qualify as an expropriation the purpose of the dispossession must be to confiscate the right as such; this is not the case where there is the incidental acquisition of property in the course of pursuing another, though legitimate, objective.[137]

[90] Such an incidental acquisition, even if it amounts to a complete taking of the property right or object in question, does not qualify as an expropriation, but is still regarded as a provision defining the contents and limits in terms of Art. 14(1) GG. This is the case, for example, when the state confiscates generally a certain class of goods in order to pursue another

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137 See Joachim Wieland "Art. 14 GG" in Horst Dreier (ed.) *Grundgesetz Kommentar* 1996 Mohr Siebeck Tübingen, Art. 14 GG at para 73; Jochen Rozek *Die Unterscheidung von Eigentumsbindung und Enteignung* 1998 Mohr Siebeck Tübingen (Series: Jus Publicum 31) at 144-146 and 225; Brun-Otto Bryde "Art. 14 GG – Eigentum und Erbrecht" in Ingo von Münch / Philip Kunig *Grundgesetz-Kommentar* 1992 (4th edition) C.H.Beck München, Art. 14 GG at para 58.

legitimate public interest, such as the protection of an endangered animal species.[138]

138 BVerfG, NJW 1990, 1229 – *Beschlagnahme und Einziehung von Elfenbeingegenständen* ("Attachment and forfeiture of ivory objects").

[91] In Germany every provision defining the contents and limits of property has to be justified by a proportionality analysis. Within this balancing process, the impact of the regulation on the property owner is an important consideration. Other concerns are the importance of the property right both to the owner and to society, the effort expended and expenditure incurred by the owner in order to acquire the right for herself, and whether the owner could legitimately expect that the particular right in the property in question would continue indefinitely without any modification.[139]

[92] Particularly the last criterion has led the courts to require that, for certain limiting measures to be lawful, they have to be accompanied by some mitigating measure for the person whose property is subject to the limiting measure to ensure the protection of confidence in existing property rights.

[93] Most often, regulations that limit existing property rights may only do so if transitional provisions are provided to cushion the limitation when it takes effect.[140] In cases where regulations impose a severe burden or amount effectively to a complete taking of the vested

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139 See Kommers (above n 136) at 254-255; Michalowski and Woods (above n 136) at 322-324; Van der Walt (1999) above n 79 at 135-136; Wieland (above n 137) Art. 14 GG at para 80 and 118-122; Bryde (above n 137) Art. 14 GG at para 59-65. Leading cases in that regard are e.g. BVerfGE 37, 132 – *Mieterschutz* case (1974); BVerfGE 53, 257 – *Versorgungsausgleich* case (1980); BVerfGE 83, 201 – *Bergrechtliches Vorkaufsrecht* Case (1991).

140 Cf. BVerfGE 58, 300 (351) – *Nassauskiesung* case (1981): "Within the framework of Art. 14(1) GG [the legislator] may restructure individual legal positions by issuing an appropriate and reasonable transitional provision whenever the public interest merits precedence over some justified confidence . . . in the continuance of a vested right." ("[Der Gesetzgeber] kann im Rahmen des Art 14(1) GG durch eine angemessene und zumutbare Übergangsregelung individuelle Rechtspositionen umgestalten, wenn Gründe des Gemeinwohls vorliegen, die den Vorrang vor dem berechtigten (. . .) Vertrauen auf den Fortbestand eines wohlerworbenen Rechtes verdienen.")

property right, the constitution may even require the payment of compensation to equalize the effect of the non-expropriatory regulation.[141]

[141] The leading case in this regard is BVerfGE 58, 137 – *Pflichtexemplar* Case (1981) ("Deposit Copy").

United Kingdom

[94] Although not directly in point on the issue of constitutionally protected property, certain recent judgments in the Court of Appeal are instructive. The outer limit for substantive judicial review of an administrative authority on the ground of unreasonableness is encapsulated in the so-called "Wednesbury rule", namely where the authority's decision is one which no reasonable tribunal could have reached.[142] It is unnecessary to enter into the question whether, in English administrative law, lack of proportionality has been expressly recognised as part of the Wednesbury rule or whether it is a separate ground for review.[143]

[95] More recently courts have referred expressly to proportionality when reviewing executive action.[144] Suffice it to refer to the decision in *ex parte Smith* in which the Court of Appeal per Sir Thomas Bingham endorsed the following approach with regard to the review of

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142 As formulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

143 As to which see PP Craig *Administrative Law* 3ed (Sweet and Maxwell, 1994) 409-421.

144 See, for example, *R v Secretary of State for the Home Department, Ex Parte Hindley* [2000] 1 QB 152 (CA) 177G and *Halsbury's Laws of England* vol 1(1) 4ed (2001 Reissue) para 88 fn 7.

administrative discretion as an accurate distillation of the principles laid down by the House of Lords:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to the reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. *The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above*",[145] (emphasis supplied)

a formulation that has subsequently been expressly approved by the Court of Appeal in *Lord Saville's* case.[146]

[96] In adopting this test, the Court of Appeal in *Smith* did so with full appreciation of the need to respect the separation of powers between the judiciary and the executive, as the following passage from the judgment illustrates:

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the test, *but the test*

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145 *R v Ministry of Defence, ex parte Smith and other appeals* [1996] 1 All ER 257 (CA) 263c-e.

146 In *R v Lord Saville of Newdigate and others, ex parte A and others* [1999] 4 All ER 860 (CA) per Lord Woolf MR.

itself is sufficiently flexible to cover all situations."[147] (Emphasis supplied)

In *Lord Saville's* case it was also well appreciated that this test went beyond questions of "mere rationality", as the following passage shows:

147 Above n 145 at 264g-j.

> "In such cases it is said that the decision is irrational or perverse. But this description does not do justice to the decision maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences."[148]

[97] The formulation of property rights and their institutional framework differ, often widely, from legal system to system. Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation.

[98] The second is that for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination. Moreover the requirement of such an appropriate relationship between means and ends is viewed as methodologically sound, respectful of the separation of powers between judiciary and legislature

148 Above n 146 at 871e-f.

(in the case of the United Kingdom between judiciary and executive) and suitably flexible to cover all situations. It matters not whether one labels such an approach an "extended rationality" test or a "restricted proportionality" test. Nor does it matter that the relationship between means and ends is labelled "a reasonably proportional" consequence, or "roughly proportional", or "appropriate and adapted" or whether the consequence is called "reasonable" or "a fair balance between the public interest served and the property interest affected".

[99] That the word "arbitrary" can grammatically have such a substantive content is reflected in the *Oxford English Dictionary* definition of "in an arbitrary manner" which includes "without sufficient reason". The standard set in section 25(1) is "arbitrary" and not, as in section 36(1) of the Constitution, "reasonable and justifiable".

The conclusion reached on the meaning of arbitrary in section 25

[100] Having regard to what has gone before, it is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between

the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25.

"Arbitrary" deprivation as applied to section 114 of the Act

[101] The present case is distinguishable from the Australian decisions in *Lawler* and *Airservices Australia,* referred to in paras 78-79 above. In *Lawler,*[149] factors such as the following were taken into account in holding the forfeiture of the commercial fishing boat to be valid: the protection of the fishing grounds of the nation from foreign exploitation; that this was akin to the protection of the country from smuggling; drastic action in protection of the country's interests was warranted if not expected; the difficulty of enforcing provisions against foreign owners; the difficulty of enforcing compliance along the length of the Australian coastline called for a stern deterrent;[150] the likelihood of the deliberate intrusion of the foreign boat for purposes of fishing into the declared fishing zone without the complicity of the owner of the boat being small; that the liability to forfeiture enlists the innocent owner's participation in ensuring the observance of the law and precludes the future use of the confiscated vessel in the commission of crime;[151] "in weighing the proportionality of Parliament's response in this particular field the utility of deterrent measures is of paramount importance".[152]

[102] In *Airservices Australia*[153] the considerations that weighed with the Court in upholding the statutory liens can be gleaned from the following passages in the judgment:

> "Aircraft operators, who may incur liability for charges and penalties, may have few

149 Above n 119.

150 Id at 275.

151 Id at 279.

152 Id at 295.

153 Above n 120.

assets within a particular jurisdiction at any time except aircraft, and aircraft may leave the jurisdiction very quickly. . . . [C]harges in large sums can accumulate in a short time. The charges are for services related to the safety of aircraft, and those with a proprietary interest, as well as the operators, receive a benefit from those services. They are in some respect akin to necessaries supplied to a ship. The regulatory regimes . . . are likely to be widely known to owners of aircraft . . . ;"[154]

. . . .

"[the owners knew] that such aircraft would be flown on routes to, from and within Australia, attracting charges for services and facilities provided to all airline operators. . . . [I]t would have been open to [the owners] to protect themselves (by contract, insurance, or facilities for auditing and reporting) against the kind of result that ensued."[155]

. . . .

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154 Id para 96 per Gleeson CJ and Kirby J.

155 Id para 101 per Gleeson CJ and Kirby J.

> "While there is no 'illegality' in this case . . . the owners and lessors of an aircraft, like the owners of the ship in *Lawler*, cannot be regarded as third parties who have no rational connection with the achievement of the purpose sought to be achieved by the impugned provision."[156]

[103] The Australian High Court judgment in *Burton v Honan*,[157] on which reliance was placed on the Commissioner's behalf both in the High Court and in this Court, is likewise distinguishable. It concerned an imported motor car that was seized in the hands of a purchaser in good faith as goods forfeited to the Crown pursuant to section 229 of the *Customs Act* 1901-1950. The person importing the car had been convicted of the offence of having unlawfully imported the car and under section 229 this resulted in the car in question being forfeited to the Crown. In regard to such forfeiture, section 262 provided that it would have effect as condemnation of the car. The High Court in effect held that such forfeiture and condemnation did not constitute an acquisition under section 51(xxxi) of the Constitution, for which "just terms" would have been necessary, but a valid deprivation under the *Customs Act.* In this regard

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156 Id para 351 per McHugh J.

157 (1952) 86 CLR 169.

Dixon CJ said the following:[158]

> "It is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental powers for the purposes of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within s. 51 (xxxi.) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender."

[104] Dealing with an argument relating to the inequity of the forfeiture in relation to the purchaser in good faith, Dixon CJ said the following:

158 Id at 181.

> "In the administration of the judicial power in relation to the Constitution there are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon. The reason why this appears to be so is simply because a reasonable connection between the law which is challenged and the subject of the power under which the legislature purported to enact it must be shown before the law can be sustained under the incidental power."[159]

What appears to have constituted the "reasonable connection" in that case was that –

> " . . . the history of English and Australian Customs legislation forfeiture provisions are common, drastic and far-reaching, and that they have been considered a necessary measure to vindicate the right of the Crown and to ensure the strict and complete observance of the Customs laws, which are notoriously difficult of complete enforcement in the absence of strong provisions supporting their administration."[160]

[105] In the present case we are not dealing with the forfeiture of property in the hands of those who have committed offences or assisted in the commission of offences, whether customs or other offences, nor with imported property that has been declared forfeited. In the present case we are also not concerned with property that has been unlawfully smuggled into the country or in

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159 Id at 178.

160 Id at 178-179.

respect whereof an offence has been committed in the course of importation, nor where imported property is for such or any other similar reason subject to forfeiture in the hands of third parties. It deals exclusively with the recovery of a customs debt.

[106] The *Gasus*[161] case, which was relied upon by the High Court and featured prominently in the Commissioner's argument before this Court, is also distinguishable. That case concerned section 16(3) of an 1845 Netherlands Act. The Netherlands tax authorities could, like other creditors, recover unpaid tax debts against all the tax debtor's seizable assets. Section 16(3) empowered them to seize and recover against all movable property found on the tax debtor's premises which qualified as "furnishings", irrespective of whether or not these goods belonged to the tax debtor. Gasus had sold and delivered a concrete mixer to the tax debtor in question, but it had been a condition of the sale that Gasus would retain ownership thereof until all amounts due had been paid. Under the provisions of section 16(3) the Netherlands tax authorities seized the concrete mixer on the debtor's premises. Under section 16(3) the concrete mixer, on the facts, qualified as a "furnishing". The European Court, by six votes to three, concluded that there had been no violation of Article 1 of Protocol 1.[162]

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161 Above n 90.

162 See above para 84.

[107] In its judgment, the majority –

(a) examined the complaint under the head of "securing the payment of taxes" under the "third rule" of Article 1[163] and clearly accorded the Netherlands a margin of appreciation in relation to the ambit of section 16(3).[164] This Court has held that, because of such margin of appreciation – which operates in the international sphere and is not to be confused with the appropriate deference a court ought to pay to a domestic legislature – judgments of the European Court of Human Rights must be considered with particular caution when it has decided that there has been no infringement of the Convention.[165]

(b) regarded Gasus' right of ownership to be something different from "true" or "ordinary" property rights and considered it –

> "apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price. A state may therefore legitimately, within its margin of appreciation, differentiate between

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163 Above n 90 at 433.

164 Id paras 65, 66 and 68 and para 4 of the dissenting judgment.

165 *S v Makwanyane* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at para 109; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) at para 41.

retention of title and other forms of ownership."[166]

It has already been indicated, in paras 54-56 above, why such a proposition, if applied to South African law, rests on an incorrect analysis and cannot be accepted.

(c) considered it to be relevant that –

166 See n 164 para 68

> ". . . the owners of goods subject to seizure under section 16(3) of the 1845 Act had knowingly allowed them to serve as 'furnishings' of the tax debtor's premises. They might therefore well be held responsible to some extent for enabling the tax debtor to present a semblance of creditworthiness."[167]

The motor vehicles in the present case did not serve as "furnishings" and there is no evidence to suggest that FNB, by placing the respective customs debtors in possession thereof, induced any belief in the Commissioner which could in any way have been to the latter's detriment, either at the time of the debtors importing the goods in respect whereof they owe the duty or subsequently. For these reasons, the *Gasus* case is also distinguishable from the present and, in any event, one is constrained to disagree with the conclusions reached if they are sought to be applied under the South African Constitution.

[108] Here the end sought to be achieved by the deprivation is to exact payment of a customs debt. This is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all its inhabitants. Section 114, however, casts the net far too wide. The means it uses sanctions the total deprivation of a person's property under circumstances where (a) such *person* has no connection with the *transaction* giving rise to the customs debt; (b) where such *property* also has no connection with the *customs debt*; and (c)

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167 Id para 70.

where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt.

[109] In the absence of any such relevant nexus, no sufficient reason exists for section 114 to deprive persons other than the customs debtor of their goods. Such deprivation is accordingly arbitrary for purpose of section 25(1) and consequently a limitation (infringement) of such persons' rights.

Justification

[110] It might be contended that once the deprivation has been adjudged to be arbitrary, no scope remains for justification under section 36. By its terms, section 36 of the Constitution draws no distinction between any rights in the Bill of Rights when it provides that "[t]he rights in the Bill of Rights may be limited".[168] Neither the text nor purpose of section 36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions. In view of the conclusion ultimately reached on this part of the case, it is not necessary to decide this question finally here. It will be assumed, without deciding, that an infringement of section 25(1) of the Constitution is subject to the provisions of section 36.

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168 Section 36(1) provides as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[111] It is unnecessary, on the facts of the present case, to embark in any detail on the section 36(1) justification analysis, incorporating that of proportionality applied to the balancing of different interests, as enunciated in *S v Makwanyane and Another*[169] and as adapted for the 1996 Constitution in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*.[170] FNB's ownership in the vehicles concerned is ultimately completely extinguished by the operation of section 114 of the Act. As against this the Commissioner gains an execution object for someone else's customs debt. But, as already indicated, there is no connection between FNB or its vehicles and the customs debt in question. Under these circumstances the object achieved by section 114 is grossly disproportional to the infringement of FNB's property rights.

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169 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) para 104.

170 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) para 33-35.

[112] The amount of money recovered by the Commissioner in the past on the sale of goods belonging to persons other than customs debtors can play little if any role in the justification enquiry in the present case. In the present case Conradie J's unchallenged finding was that the amount so recovered was "next to nothing".[171] But even if the amount were substantial, it would not necessarily follow that, by itself, this would constitute justification. One would still have to weigh up the nature and extent of the limitation in question and decide whether such limitation was reasonable and justifiable merely by virtue of the fact that a substantial financial advantage accrued to the state as a direct consequence of the limitation. It is unnecessary, in the circumstances of the present case, to pursue such an enquiry any further. For the same reason the judge's following comment is not germane to the justification enquiry in the present case:

> "The coercive effect on a shipping agent of having its customers' goods attached as security for duty which it owes must be considerable. I am not prepared to say that the Revenue should get along without the use such invasive measures."[172]

Coercion by the state premised on the infringement of persons' constitutional rights cannot serve to justify the infringement in the present case, where the benefit to the state is so minimal. It is unnecessary to decide whether, if the coercive effect were greater, this

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171 Above n 1 at 335B.

172 Id.

would be relevant to the justification enquiry.

[113] No other fact or consideration has been urged, or comes to mind, that might be relevant in applying section 36(1). Under the circumstances the conclusion is unavoidable that the infringement by section 114 of section 25(1) is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provision is accordingly constitutionally invalid.

The appropriate relief:

[114] On the basis of the above conclusion regarding FNB's property attack, it is impossible textually to sever the good from the bad in section 114 of the Act without embarking on an extensive redrafting of the section, an action which would impermissibly trespass on the terrain of the legislature and be inappropriate in the present case. Considering only the successful property attack, the appropriate remedy would be an order declaring the provisions of section 114 to be constitutionally invalid to the extent that they provide that the goods of persons other than the customs debtor referred to in the section are subject to a lien, detention and sale; an order analogous to the order made in *Ferreira v Levin*.[173] I would stress that, because of the expansive wording of section 114 and for the reasons mentioned, it is not possible to tailor a narrower order of constitutional invalidity. This must not be taken to imply that there may not be circumstances when the nexus between the third party and the customs debtor, or that between the goods of the third party and the customs debtor or that between the goods of the third party

173 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) para 157.

and the customs debt is such that the detention and sale of such goods would pass constitutional muster. There may well be such situations and it may be possible to craft a statutory provision which would limit the detention and sale of the goods of third parties to such circumstances. But that is a task for the legislature and not for this Court.

[115] The remedy referred to above in respect of the successful property challenge affords FNB all the relief sought by it in these proceedings. Even if FNB were to succeed on its access to court challenge, no additional substantive relief could be granted to it. Under these circumstances it is unnecessary to consider this constitutional challenge of FNB. This conclusion notwithstanding, anxious consideration has been given by the Court to the question whether it might not be in the public interest to decide this issue, inasmuch as it was raised in the High Court.

The section 34 access to court challenge

[116] In the process of considering such possibility, it eventually became apparent that the provisions of the Act in relation to this issue were even more complex than they appeared at the conclusion of argument. On material matters in this regard the Court has not had the benefit of any, or sufficiently comprehensive argument. Under these circumstances it would be inadvisable to decide the issue.

[117] There are substantial doubts as to whether the procedural provisions of section 114 are

consistent with section 34 of the Constitution in the light of the *Lesapo* judgment[174] because, as pointed out in para 20 above, the Commissioner is able to take possession of and sell the goods referred to in section 114 without having to invoke court process beforehand. In *Lesapo* the Court declared section 38(2) of the North West Agricultural Bank Act 14 of 1981 to be constitutionally invalid because the relevant provisions provided that the bank could proceed in various ways against its debtors "without recourse to a court of law" and because the debtor enjoyed none of the statutory or other safeguards applicable to the attachment and sale in execution of a judgment debt.[175]

[118] By contrast, in *Metcash,*[176] this Court declined to uphold a similar attack in respect of sections 36(1), 40(2)(a) and 40(5) of the Value-Added Tax Act 89 of 1991 (the VAT Act). The crucial distinguishing feature in *Metcash* was section 40(2)(a) of the VAT Act which provides that the Commissioner may, in respect of tax due, file with the clerk or Registrar of any competent court, a statement certified by him regarding such tax due and such statement thereupon has all the effects of, and any proceedings may be taken thereon as if it were, " a civil judgment given in that court". The consequence hereof is that:

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174 *Chief Lesapo v North West Agricultural Bank* 1999 (12) BCLR 1420 (CC); 2000 (1) SA 409 (CC).

175 Id para 10.

176 *Metcash Trading Limited v The Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC); 2001 (1) SA 1109 (CC).

> "[i]n contradistinction to the self-initiated, self-driven and self-supervised mechanism involved in *Lesapo* and the two cases following it, the execution process created by section 40(2)(a) of the [VAT] Act specifically goes via the ordinary judicial institutions. It requires the intervention of court officials and procedures. The subsection, by saying that once the Commissioner's statement has been filed it has 'all the effects . . . of a civil judgment', quite unequivocally includes by reference the whole body of legal rules relating to execution. Filing the statement sets in train the ordinary execution processes of the particular court."[177]

Any doubt as to the validity of section 114 on the grounds of its inconsistency with section 34 of the Constitution would be removed by an amendment of the present Act to incorporate a provision corresponding to that of section 40(2)(a) of the VAT Act.

The other challenge

[119] Inasmuch as the property attack has been successful, it is unnecessary to decide on the correctness or otherwise of FNB's freedom of economic activity and trade challenge either under section 26 of the interim Constitution or under section 22 of the 1996 Constitution. FNB did not contend that a successful challenge under these sections would lead to a more extensive striking down of section 114 than achieved under the property challenge.

177 Id para 51.

Disposal of the appeal in the Lauray-Airpark case, Cape of Good Hope High Court case no. 825/99

[120] The appeal must succeed on the basis of the property challenge, and section 114 of the Act must be declared to be inconsistent with the Constitution to the extent that it provides that the goods of persons other than the customs debtor envisaged in the section are subject to a lien, detention and sale.

[121] It is necessary to consider whether, under section 172(1)(b)[178] of the Constitution, it would be just and equitable to limit the retrospective effect of the declaration of invalidity or to suspend it, or to do both. As far as the former is concerned the principal factors relating to the

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178 Section 172(1)(b) reads as follows:

> "172.___Powers of courts in constitutional matters.—(1)__When deciding a constitutional matter within its power, a court—
>
> (a) . . .
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

retrospectivity of such an order were stated by O'Regan J in the *Bhulwana* case:[179]

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants. . . . On the other hand, as we stated in *S v Zuma* (at 43), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. As Harlan J stated in *Mackey v US* 401 US 667 (1971) at 691:
>
> > 'No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.'
>
> As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity." (Certain authorities omitted.)

179 *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) para 32.

[122] These principles, although stated in relation to the interim Constitution and in respect of criminal matters, are equally applicable to the "just and equitable" enquiry under section 172(1)(b) of the Constitution,[180] and to civil matters. It would not be just and equitable to prejudice persons who have in good faith purchased goods pursuant to the selling provisions of section 114 of the Act and have been placed in possession of such goods pursuant to such sales. It would also be disruptive, burdensome and difficult to reverse the consequences of such sales if they were to be invalidated. The same consideration would apply to court cases under section 114 that have been finalised. It would therefore be just and equitable to limit the retrospective operation of the order to exclude such sales and also finalised cases from its operation.

[123] There is no good reason for suspending the order of constitutional invalidity in consequence of the property challenge. The invalidity relates only to goods owned by persons who are not customs debtors as envisaged by section 114. Such goods represent no more than a minute proportion of goods annually attached and its effect on the fiscus is negligible. By contrast it would be wholly disproportionate to require any individual owner of goods, not being a customs debtor as envisaged by section 114, to have to forego her constitutional rights and suffer the loss of ownership of such goods, even for a limited period of time. Parliament remains free to amend or restructure section 114 of the Act, and any related provisions, in response to the judgment and order in this matter, provided it does so in a manner that is consistent with the Constitution.

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180 *S v Ntsele* 1997 (11) BCLR 1543 (CC); [1998] 1 All SA 15 (CC) paras 12-14.

[124] As far as the costs of appeal are concerned no good reason exists why the appellant should not be awarded its costs, in view of the fact that it has achieved substantial success in the result. Likewise it is entitled to its costs in the High Court, with the exception of the costs of the postponed hearing on 22 February 2000. This postponement was necessitated by a belated application by FNB to amend its notice of motion in order to introduce the contention that section 114 of the Act violated the right to access to court of customs debtors. FNB was ordered to pay these costs, regardless of the outcome on the merits, because the High Court was of the view that the notice of amendment was given too late, in view of the complexities of the matter. No good grounds exist for interfering with this costs order.

Disposal of the appeal in the Republic Shoes case, Cape of Good Hope High Court case no. 9101/94

[125] As indicated in paragraph 3 of this judgment the Cape High Court correctly granted no substantive relief to FNB in this matter. FNB's counsel in this case (who also appeared in this Court on its behalf in the Republic Shoes case) contended in the High Court, however, that if FNB was successful in the Lauray-Airpark case it should not be ordered to pay all the costs in the Republic Shoes case, because a great deal of the research done in the latter case was utilised in the former. Inasmuch as no relief was granted to FNB in the Lauray-Airpark case either, the High Court correctly found it unnecessary to consider this contention.[181]

[126] The present limited appeal in the Republic Shoes matter on the question of costs was

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181 Above n 1 at 337B-D.

premised on the fact that FNB would achieve substantial success on appeal in the Lauray-Airpark case. FNB has achieved such success and it accordingly becomes necessary to consider the argument on the costs to be awarded in the High Court. It must be borne in mind that in as much as it was unnecessary for the High Court to consider what an appropriate costs order would have been in the Republic Shoes matter if FNB had been successful before it in the Lauray-Airpark matter, this Court, if it decided to deal with it, would be at large on the question of such costs.

[127] It was contended on appeal that in the event of FNB achieving substantial success on appeal in the Lauray-Airpark matter, the question of the High Court costs should be remitted to the High Court for consideration. In the alternative, it was submitted that this Court could consider the matter as being an issue connected with a decision on a constitutional matter for purposes of section 167(3)(b)[182] and should order that –

(a) the respondent should pay FNB's costs arising from research into and consideration of the comparative international situation, as though the costs had been incurred in the Lauray-Airpark matter;

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182 Section 167(3)(b) provides:

"The Constitutional Court –

. . .

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters".

alternatively,

(b) any costs order in respondent's favour should exclude costs arising from research into and consideration of the comparative international situation.

[128] If this Court has the power under section 167(3)(b) of the Constitution to consider this issue on costs then it should do so. It is in as good a position as the High Court to consider the matter. This was in fact the view of the High Court in granting a positive certificate to FNB under Constitutional Court Rule 18(6). There is, moreover, no justification for incurring further costs that a referral back to the High Court would entail, merely to determine liability for costs already incurred.

[129] In essence the argument advanced on FNB's behalf is that certain costs incurred in the Republic Shoes case ought to be treated as though they were incurred in the Lauray-Airpark case. This would in effect require a consideration of the interrelationship between the two cases and the costs incurred in the latter case. This is an issue connected with a decision on a constitutional matter, namely the unconstitutionality of section 114 of the Act, which in turn entitles FNB to its costs in the Lauray-Airpark case, and this Court ought to consider it.

[130] The argument in support of the costs relief contended for was twofold. In the first place it was contended that the timing of the *in limine* point, namely that FNB had no cause of action under the interim Constitution, was important. Had the respondent raised it at an earlier stage FNB would not have persisted with the Republic Shoes matter. There is no merit in this submission. There is no suggestion that the respondent acted in bad faith and deliberately

withheld raising the absence of a constitutional cause of action in order to increase the costs at FNB's expense. Moreover, the fact that the respondent did not grasp or raise the point earlier, affords no excuse for FNB not being aware of it sooner.

[131] Secondly it was argued that the international comparative research had, in any event, to be done for the Lauray-Airpark matter, had to be done only once, and was not wasted. Because FNB enjoyed the benefit in this case of the research done in the Republic Shoes case, it should, at the very least, not have to bear those costs in the latter case. This contention cannot be acceded to. It is nothing more than a collegial wind-fall for counsel or legal representatives in case X to benefit from research done by legal representatives in case Y. The issues in the Lauray-Airpark case are complex and difficult, as both this and the High Court judgment demonstrate. The case amply warranted the employment of two counsel on FNB's behalf. Two counsel were not employed. Instead separate single counsel were employed for each case. This the litigant is fully entitled to do, but must live with the consequences of its decision. No sound principle of law, fairness or logic suggest itself why work done and money expended by an applicant in one case, in which the applicant achieves no success, can be treated as though it were work done in a separate case, simply because the applicant's legal representatives in the latter case have fortuitously benefited from it.

The Order

[132] It is convenient at this stage to quote the actual order made by the High Court so that the impact of our order on that of the High Court can be clearly appreciated. In the High Court both cases were dealt with in one order.

"(1) The detention of a Volkswagen Jetta motor vehicle in the possession of Lauray Manufacturers CC belonging to the applicant and the detention of Mercedes-Benz and Volkswagen Golf motor vehicles in the possession of Airpark Halaal Cold Storage CC belonging to the applicant was not unlawful.

(2) The applicant is to pay –

(a) the costs of this application;

(b) the costs of the postponed hearing on 22 February 2000; and

(c) the costs of *First National Bank Limited v The Minister of Finance* (Case no 9101/94),[183]

all such costs to include the costs of two counsel."[184]

[133] The following orders are accordingly made:

A: In the Cape of Good Hope High Court case *First National Bank of SA Limited v The Minister of Finance* (Case no 9101/94):

The appeal is dismissed with costs and the appellant is ordered to pay the costs in the High Court.

B: In the Cape of Good Hope High Court case *First National Bank of SA Limited v The*

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183 By mistake referred to in the High Court order as Case no: 1901/94.

184 This is the order made by the High Court on 2 March 2001 as subsequently amended on 26 April 2001. It is to be noted that the High Court order, as reflected in both the Butterworths Constitutional and the South African Law Reports does not reflect the amendment brought about by the order of 26 April 2001.

Commissioner for the South African Revenue Services and the Minister of Finance (Case no. 825/99):

1. The appeal succeeds with costs.

2. The provisions of section 114 of the Customs and Excise Act 91 of 1964 are declared to be constitutionally invalid to the extent that they provide that goods owned by persons, other than the person liable to the State for the debts described in the section, are subject to a lien, detention and sale.

3. The order in paragraph 2 shall not apply –

   3.1 to sales of goods to purchasers, resulting from the application of the provisions of section 114, where such purchasers have been placed in possession of such goods pursuant to such sales; or,

   3.2 to any case in which judgment has been given and in which, as at the date of this order, neither an appeal nor a review is pending or the time for the noting of an appeal has expired.

4. The High Court order is set aside and replaced with the following:

   "1. The detentions of a Volkswagen Jetta motor vehicle in the possession of Lauray Manufacturers CC belonging to the applicant and of Mercedes-Benz and Volkswagen Golf motor vehicles in the possession of Airpark Halaal Cold Storage CC belonging to the applicant were unlawful.

   2. The applicant is to pay the costs of the postponed hearing on 22 February 2000, such costs to include the costs of two counsel.

3. Save for the costs referred to in paragraph 2, the respondents are to pay the costs of the application in the case of *First National Bank of SA Limited v The Commissioner for the South African Revenue Services and The Minister of Finance* (Case no 825/99)."

Chaskalson CJ, Langa DCJ, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ, Skweyiya AJ concur in the judgment of Ackermann J.

For the appellant: Cape High Court Case Number 825/99	AM Breitenbach and N Bawa instructed by Field & Gowar Inc, Cape Town.
For the appellant: Cape High Court Case Number 9101/94	SC Kirk-Cohen instructed by Field & Gowar Inc, Cape Town.
For the respondents:	GJ Marcus SC, JP Vorster SC and CS Kahanovitz instructed by the State Attorney, Cape Town.